No. 763

Supreme Court of the United States

OCTOBER TERM, 1963

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY; ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DEAN ACHESON,
W. GRAHAM CLAYTOR, JR.,
701 Union Trust Building,
Washington 5, D.C.

MALCOLM L. MONROE,
1424 Whitney Building,
New Orleans, Louisiana,
Attorneys for Petitioner.

MONROE & LEMANN,
WALTER J. SUTHON, III,
JERRY A. BROWN,
1424 Whitney Building,
New Orleans, Louisiana.

COVINGTON & BURLING,
BRICE M. CLAGETT,
701 Union Trust Building,
Washington 5, D. C.

Of Counsel.

January, 1964.

INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

Miscellaneous—Continued

Supreme Court of the United States

OCTOBER TERM, 1963

No.

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner, Whitney National Bank in Jefferson Parish (hereafter "Whitney-Jefferson"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 14, 1963, in the above-entitled case and in the companion case of *James J. Saxon, Comptroller of the Currency* v. *Bank of New Orleans and Trust Company.* That judgment affirmed, on other grounds, a judgment of the United States District Court for the District of Columbia granting a declaratory judgment and a permanent injunction against petitioner and the defendant Comptroller which forbids the opening for business of a national bank

(Whitney-Jefferson). Petitioner is advised that the Comptroller of the Currency (hereinafter "the Comptroller") will file a petition for certiorari in the companion case.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (McLaughlin, J.) (R. 435) is reported at 211 F. Supp. 576 (*sub nom. Bank of New Orleans and Trust Company* v. *Saxon*). The opinion of the Court of Appeals (Miller, J.) is reported at 323 F.2d 290, and appears in the Appendix at page 37. The judgment of the Court of Appeals appears in the Appendix at page 62, and the order of the Court of Appeals denying petitioner's petition for rehearing appears in the Appendix at page 63.

JURISDICTION

The opinion and judgment of the Court of Appeals for the District of Columbia Circuit were filed on August 14, 1963. Petitioner's timely petition for rehearing en banc was denied by that Court on October 17, 1963. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Can a bank holding company subsidiary, organized in accordance with the provisions of the Federal Bank Holding Company Act of 1956 and complying with all other federal statutes and regulations, be a "branch" within the meaning of 12 U.S.C. § 36(*c*)?
2. When a Court of Appeals concludes that the crucial issue in a case decided below on summary judgment is an issue of fact not decided

by the District Court, may the Court scrutinize the papers and decide the case on the basis of a view of the facts never alleged by any party and controverted by sworn material in the record, or should it remand the case to the District Court for a trial?

3. When Congress has determined that review of federal administrative action approving a bank-holding-company application should be by petition in a Court of Appeals, may such review be had by equitable and declaratory proceedings in a District Court?

STATUTES INVOLVED

The statutes primarily involved are the provisions of the National Bank Act authorizing the Comptroller of the Currency to issue certificates permitting the opening for business of national banks (12 U.S.C. §§ 26 and 27); the provision of the National Bank Act regulating the establishment of branches by national banks (12 U.S.C. § 36(c)); and certain sections of the Federal Bank Holding Company Act of 1956, *e.g.*, 12 U.S.C. §§ 1841, 1842, 1845, 1846, 1847, and 1848. These statutes appear in the Appendix hereto at pages 28-36.

Also involved is Rule 56(c) of the Federal Rules of Civil Procedure, which reads as follows:

> "(c) Motion [for summary judgment] and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

STATEMENT

Whitney National Bank of New Orleans (hereafter "Whitney-New Orleans") is a national bank located in the city of New Orleans, which is co-extensive with the Parish of Orleans. That parish includes only the central part of the greater New Orleans metropolitan area. Both Whitney-New Orleans and all other New Orleans national banks are prevented by 12 U.S.C. § 36(c) from establishing branches outside Orleans Parish. That section provides that national banks may establish branches only within the geographical limits imposed by state law on state banks. Louisiana state banks in New Orleans with assets of $100,000. or more are prohibited from establishing branches outside Orleans Parish by Louisiana Revised Statues 6: §§ 54 and 328.

Jefferson Parish, adjacent to Orleans Parish, is a rapidly developing part of the New Orleans metropolitan area (R. 100-101). Many of the residents of Jefferson Parish have been customers of Whitney-New Orleans and other New Orleans banks, but find it inconvenient to maintain their relations with downtown banks which are precluded from establishing branches in their neighborhoods. Two of Whitney-New Orleans' three principal competitors have met this problem by establishing "affiliate" or "satellite" banks in Jefferson Parish. For example, Whitney-New Orleans'

largest competitor, the National Bank of Commerce of New Orleans, accomplished this result by arranging for a majority of its stockholders to organize, as majority owners, a new bank in Jefferson Parish, named the National Bank of Commerce in Jefferson Parish (R. 42, 49-56, 116-117).

The close connections established by these competitors with banks in Jefferson Parish gave them a substantial competitive advantage. In these circumstances Whitney-New Orleans determined that it, too, must establish relations with a bank in Jefferson Parish. Whitney-New Orleans therefore prepared a program by which a new national bank would be established in Jefferson Parish, a separate corporate entity, but connected with Whitney-New Orleans in that the stock of both banks would be owned by the same bank holding company. The purpose of this program was to obtain for Whitney-New Orleans as many of the advantages of having a branch in Jefferson Parish as could legally be had through a holding-company system.

The stockholders of Whitney-New Orleans adopted a plan of reorganization which would result in the ownership of the stock of Whitney-New Orleans by Whitney Holding Corporation and the ownership of the stock of Whitney Holding *pro rata* by the former stockholders of Whitney-New Orleans. Whitney-New Orleans would then pay to Whitney Holding, out of its undivided profits available for dividends, a dividend of $650,000. Whitney Holding would use these funds to establish, as a new subsidiary, Whitney National Bank in Jefferson Parish (R. 46). Full disclosure was made by Whitney-New Orleans of the

nature and purposes of this program (R. 41-48, 324-328).

The Comptroller of the Currency was authorized by law to pass on the reorganization of Whitney-New Orleans and the formation of a new national bank in Jefferson Parish. 12 U.S.C. § 26, as amended, 12 U.S.C. § 26 (Supp. IV, 1959-1962); 12 U.S.C. § 215, as amended, 12 U.S.C. § 215 (Supp. IV, 1959-1962). The Federal Reserve Board had jurisdiction to pass on the use of funds of Whitney Holding to create Whitney-Jefferson and on the acquisition of the stock of that bank by Whitney Holding. Act of May 9, 1956, c. 240, §§ 2-9, 70 Stat. 133, as amended, 12 U.S.C. §§ 1841-1848. Whitney-New Orleans accordingly submitted its program to the Comptroller of the Currency and the Federal Reserve Board, both of which after detailed investigation approved the program. The Federal Reserve Board's action was taken after a public hearing, held on January 17, 1962, of which notice had been previously given in the Federal Register (R. 58) inviting all interested parties to appear and register their views. None of the respondents appeared or registered any objection to the Whitney program or any part thereof (R. 61). The Federal Reserve Board's order of May 3, 1962, approved the formation of Whitney Holding Corporation and its acquisition of the stock of its two proposed banking subsidiaries (R. 96).

In the same month Whitney-Jefferson was organized and recognized by the Comptroller, who approved the final steps necessary to complete the program (R. 34, 392-394). The sole remaining legal step necessary to permit the opening of Whitney-Jefferson for business was the issuance by the Comptroller, under

12 U.S.C. §27, of a certificate authorizing it to commence the business of banking. The Comptroller was about to issue such a certificate when this action was filed on June 9, 1962.

The plaintiffs, who are three Louisiana state banks, sought a declaratory judgment and an injunction against the Comptroller prohibiting him from issuing his certificate, on the ground that Whitney-Jefferson was an illegal "branch" of Whitney-New Orleans. The jurisdiction of the District Court was invoked under 28 U.S.C. §1331. Whitney-Jefferson intervened as a defendant. The issuance of the certificate and the opening of the bank were enjoined *pendente lite* first by a temporary restraining order and subsequently by a preliminary injunction.

On June 27, 1962, a bill then before the Louisiana legislature (introduced June 3, 1962; R. 314) was amended by the addition of a new provision which prohibited any bank holding company from opening a new banking subsidiary for business. The bill as so amended was enacted into law as Louisiana Act 275 of 1962, and became effective on July 10, 1962 (R. 290, 300, 296, 301). The plaintiffs in this action thereupon claimed that the Louisiana statute furnished an additional reason why they should prevail. The State Bank Commissioner of Louisiana intervened as a plaintiff on the ground that his duties included the enforcement of the new statute (R. 346-358). The plaintiff banks and the Commissioner are the present respondents.

All parties moved for summary judgment. The District Court held that the Comptroller was precluded from issuing his certificate by the Louisiana statute and further held that this section is constitutional as

applied to national banks. The court declined to decide whether Whitney-Jefferson should be treated as an illegal "branch" of Whitney-New Orleans, 211 F. Supp. at 578, and accordingly made no findings of fact bearing on that question. It did *not* find--nor had respondents asked it to find--that Whitney-New Orleans had ever intended to operate Whitney-Jefferson as a "branch." See R. 444-50. Had respondents raised any such issue of fact, a trial would have been required, since petitioner and the Comptroller, who vigorously denied that there was ever any intent so to operate Whitney-Jefferson, would have introduced evidence in support of their denial. But that issue was neither raised nor decided.

Both the Comptroller and Whitney-Jefferson appealed, and after briefing and oral argument (directed primarily to the constitutionality of the Louisiana statute), the Court of Appeals expressly declined to pass on the constitutional issue decided by the District Court, but instead held that Whitney-Jefferson was in substance an illegal "branch" of Whitney-New Orleans. The court based its decision almost exclusively on statements made by Mr. Keehn W. Berry, President of Whitney-New Orleans, in submitting the Whitney program to the stockholders and to the federal regulatory agencies. The essence of the court's holding was that:

> "The facts . . . show, we think, that Whitney-New Orleans intends to do business through Whitney-Jefferson in the same way as if the institutions were one. The president of Whitney-New Orleans frankly made this quite clear." 323 F.2d at 303, Appendix at 58-59.

The court so held even though Whitney-New Orleans' intent as viewed by the court was clearly not among the undisputed facts on which summary judgment was had in the District Court, and no such view of its intent can be found in the findings of that court. The holding of the Court of Appeals, moreover, wholly ignored the vital question whether, even assuming that Whitney-New Orleans intended to operate Whitney-Jefferson as a branch, it would have found it possible to do so.

REASONS FOR GRANTING THE WRIT

The basic substantive issue presented by this case is whether the location of national banks which are subsidiaries of bank holding companies is to be controlled by state-law restrictions on branch banking, or, as provided in the Federal Bank Holding Company Act of 1956, by the Board of Governors of the Federal Reserve System exercising discretionary powers conferred by that statute. The question whether a separately incorporated national bank should ever, because of the ownership of its stock or for reasons related to such ownership, be considered a "branch" of another bank within the meaning of 12 U.S.C. § 36(c) (and hence subject under the provisions of that section to restrictions on location imposed by state law) is one of great importance to the banking industry and to the federal regulatory agencies. Holding-company banking (control by a bank holding company of two or more banks through stock ownership) and branch banking (conduct of a banking business by a single corporation through more than one office) have developed as alternative and distinct systems by which more than one banking office may be under the same ultimate owner-

ship. Although these systems are similar in some respects, they are fundamentally different.

Concurrent with the development of these two systems has been the development by Congress of quite different statutory patterns for regulating each. This development, which culminated in the enactment of the Federal Bank Holding Company Act of 1956, involved conscious decisions by Congress on a number of occasions as to whether branch banking and holding-company banking should be subject to the same type, or to different types, of federal regulation. Congress has consistently determined that the differing characteristics of the two types of banking make different regulatory treatment more appropriate. And in so deciding and so legislating, Congress has created additional differences between the two systems which flow from the different patterns of regulation themselves. In drafting the Federal Bank Holding Company Act of 1956 Congress specifically considered a proposal to apply state-law restrictions on the location of bank branches to holding-company banking—the result of the decision below—and rejected the proposal as undesirable.

The holding under review is, we submit, clearly inconsistent with these decisions by Congress, and would make it impossible for the federal bank regulatory agencies to apply the pattern of regulation which Congress has prescribed. The decision, moreover, although it purports to be limited to the particular facts of the case, upon analysis casts grave doubt on the legal status of 16 bank holding companies which presently operate 111 banks in ten states which prohibit or limit branch banking (R. 339-342); these existing bank holding companies, as well as future applicants for permission

to become bank holding companies or to increase their holdings of bank stock, are now threatened by the same sort of legal challenge which has so far been successful against petitioner. The question of federal law is therefore one of great importance which has not been, but should be, settled by this Court. It also presents a conflict between circuits; the decision below is impossible to reconcile with that of the Court of Appeals for the Ninth Circuit in *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962).

The second question presents one of those infrequent instances where a court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Under the Federal Rules it is of particular importance, and this Court has been especially vigilant to ensure, that the summary-judgment procedure not be employed to deprive litigants of a trial when disputed issues of fact are present. The Court of Appeals, in disposing of the present case on the basis of a view of the facts which was never litigated in the District Court, which derives no support from the findings of that court, and which raises disputed questions of fact as to which no evidence was introduced and no trial was had, has departed from established principles in a manner which urgently requires correction.

A. THE DECISION BELOW PRESENTS ISSUES OF GENERAL IMPORTANCE IN THE CONSTRUCTION AND ADMINISTRATION OF THE FEDERAL BANKING LAWS.

The Court of Appeals' decision that one separately incorporated bank may be a "branch" of another presents issues of vital importance in the construction and administration of the national banking laws. In the

century since the enactment of the National Bank Act in 1863, no court has ever, until this case, made such a holding. Branch banking is a specific and clearly understood phenomenon in American banking legislation and banking practice. Its advantages and the restrictions on its use are equally clearly understood. A subsidiary bank of a bank holding company and its proper use are quite different but well defined. The former is as different from the latter as a cow is from a goat. A goat does not become a cow because the prospective purchaser hopes to reap some of the benefits of owning a cow—*e.g.*, to keep the grass down and get milk of a sort.

The Comptroller of the Currency passes on all applications to organize new national banks. 12 U.S.C. §§ 21-27. Many of these applications are submitted by bank holding companies. Many more are submitted by individuals or groups who already have interests in other banks. The holding below amounts to a command to the Comptroller that, before passing on each such application, he must satisfy himself that the applicants have made no statements and given no other indication that their application was motivated by a desire to obtain some of the advantages of branch banking, or that they "intend," in some manner unspecified, unspecifiable, and in any case wholly academic (since the "intention," even if present, would be unattainable), to operate the new bank as though it were a branch. The holding is also, quite obviously, a threat to all persons and corporations with interests in banks who seek to organize new national banks, and an encouragement to the many banks which frequently oppose the creation of any competitive banking facilities in or near their communities to present evidence of such

"intent" to the Comptroller and, that failing, to the courts.

Under the provisions of the Federal Bank Holding Company Act of 1956, the Board of Governors of the Federal Reserve System must give prior approval to every acquisition of the stock of any bank in the United States, whether national or state, by a bank holding company. In the seven years since the enactment of that statute, approximately 81 such applications have been filed with the Board. Since a bank holding company is defined in the Act (12 U.S.C. § 1841 (a)) as a company which owns a 25% interest in two or more banks, there are few if any of the applications passed on by the Board which, if the decision under review is allowed to stand, could not be attacked on gounds similar to those here approved by the Court of Appeals. In one of the first applications to come before the Board after the appellate decision in this case, opponents of the acquisition in fact made such an attack and relied on the decision under review. *First Colorado Bankshares, Inc.*, F.R.B., Nov. 14, 1963. The Board rejected the contention, but without any real discussion of the issues; it is quite clear that, if the decision below is allowed to stand, the issue will be raised many times again, both before the Board and in the courts.

Not only *future* applicants for new banks and new holding-company applicants find themselves threatened by the decision below. At present 16 registered bank holding companies operate 111 banks in ten states which prohibit or limit branch banking (R. 339-342). These banks have resources totaling more than 2.75

billion dollars.[1] A far greater number of banks have interlocking ownership by individuals or by companies which are not defined as bank holding companies by the Federal Bank Holding Company Act. See *Chain Banking: Stockholder and Loan Links of 200 Largest Member Banks*, Report by Wright Patman, Chairman, to the Select Committee on Small Business, 87th Cong. (1963). There has never been any secret about the fact that these various types of common ownership of more than one bank are largely, if not principally, motivated by the desire to obtain such of the advantages of branch banking as are legally possible thereby.[2] In the case of many or most of the hundreds of banks whose stockholders (individual or corporate) have interests in other banks, it would doubtless be possible to find statements concerning the purpose of the common ownership far more indicative of an intent to obtain some of the advantages of branch banking than was the case here.[3] If the decision below is permitted to stand, each of these banks will be subject to the

---

[1] This figure is a composite approximation derived from Rand McNally's *Bankers' Directory* (final 1963 ed.).

[2] See, *e.g.*, Board of Governors of the Federal Reserve System, "Branch, Chain, and Group Banking," in *Banking Studies* (1941); testimony of John W. Pole, Comptroller of the Currency, *Hearings Before the House Committee on Banking and Currency under H. Res. 141 (Group, Chain and Branch Banking)*, 71st Cong., 2d Sess., Vol. 1, Part 1, pp. 5-26 (1930); H. R. Rep. No. 609, 84th Cong., 1st Sess. 6 (1955); Fischer, *Bank Holding Companies* 1, 23, 138 (1961).

[3] For a case where such statements were made but were deemed wholly insufficient to make the new bank a "branch," see Camden Trust Co. v. Gidney, 112 U.S. App. D.C. 197, 301 F.2d 521, *cert. denied*, 369 U.S. 886 (1962).

serious threat of actions brought by their competitors claiming that they are illegal "branches."

The contention which now bears the stamp of approval of the Court of Appeals for the D.C. Circuit is wholly erroneous. Congress has, since the enactment of the McFadden Act, 44 Stat. 1224 (1927), the predecessor of the present 12 U.S.C. § 36(c), permitted and regulated the establishment of branches by national banks. In 1933, by the enactment of a series of provisions (presently 12 U.S.C. §§ 61, 161, 221a, 334, 481) regulating bank holding companies, and in 1956, with the enactment of the Federal Bank Holding Company Act, Congress chose to subject holding-company banking to a quite different pattern of regulation. And Congress did this in the full knowledge that the two types of banking possess many similarities, that holding companies are often organized because branch banking is forbidden, and that holding-company-owned banks can, and often do, have the same management and policies. *Hearings Before the House Committee on Banking and Currency Under House Resolution 141 (Group, Chain and Branch Banking)*, 71st Cong., 2d Sess., Vol. 1, Part 1, pp. 5, 26 (1930).

Most conclusive of all, Congress considered including in the Federal Bank Holding Company Act of 1956 a provision subjecting holding-company banking to the same limitations as to location that apply to branch banking—the precise issue involved in this case—and rejected the proposal on the ground that the two types of banking should in this respect be treated differently. This Act (12 U.S.C. §§ 1841-1848) was passed after 18 years of Congressional study. In the early drafts of the bill, efforts were made in both the House and the Senate (H.R. 6227 and S. 880, 84th Cong.,

1st Sess.) to make bank-holding-company operations subject to the restrictions on branch banking. The proposed provision read:

> "Notwithstanding any other provisions of this section, no application shall be approved under this section which will permit . . . (2) any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank, except (i) within geographic limitations that would apply to the establishment of branches of banks under the statute law of such state. . . ."

This provision would have accomplished the precise result in this case—the result which respondents claim had been accomplished by the enactment of Section 36(c) 22 years prevjously. The proposal would have made holding-company susidiaries the equivalent of "branches" and would have prohibited them where state law prohibits branches.

This proposed provision was included in the bill as passed by the House of Representatives. Extended testimony and arguments for and against the provision were presented to the Senate Subcommittee on Banking and Currency. *Hearings before a Subcommittee of the Committee on Banking and Currency, United States Senate (Control of Bank Holding Companies)*, 84th Cong., 1st Sess., pp. 45, 47-48, 77-78, 80-82, 85, 89-90, 104-105, 107, 111, 112-129 (1955). The Senate Committee, after full consideration, reported to the Senate a bill (S. 2577) which eliminated the proposed tie-in with the branch-banking law. The

Committee gave its reasons for rejecting that proposal as follows:

> "The committee decided against the inclusion of a provision in the bill that would automatically apply State laws concerning branch banking to bank holding company operations. The purposes of branch banking laws are not identical with the purpose of this bill to control bank holding companies. Moreover, branch banking is mostly conducted by the use of depositors' funds, thus making the protection of these funds of prime importance. Bank holding companies, however, as such have no depositors. For operating funds they have recourse to equity capital supplied by their shareholders. It is believed the bill contains adequate provisions to regulate bank holding company operations without an arbitrary tie-in with branch banking laws." S. Rep. No. 1095, 84th Cong., 2d Sess., Part 1, p. 11 (1956).

The statute as enacted omits the proposed tie-in with the branch-banking law which had been debated so exhaustively. It expressly permits the purchase of bank stock by a bank holding company upon approval by the Federal Reserve Board. The statute lists five statutory factors which the Board is to consider in deciding whether to approve or disapprove an application for such a purchase. (12 U.S.C. § 1842 (c)). The statute conspicuously refrains from providing that the application must be disapproved if Section 36(c) would prohibit the establishment of a branch bank in the same circumstances. That proposal Congress had expressly rejected.

The Court of Appeals in its decision never mentioned the Federal Bank Holding Company Act of 1956 or the considered congressional policy of treating branch banking and holding-company banking differently. The court's decision rests on its assertion that the Whitney officials *intended* to operate Whitney-Jefferson as though it were a branch. The answer is twofold: first, there is no proof that they intended anything of the sort, and this issue was neither submitted to nor decided by the District Court (see Section B, page 21 *infra*); and second, even if they had so intended, it would have been wholly impossible for them to carry any such intention into effect. This is so primarily because of the regulatory scheme laid down by Congress itself, which has ensured that the powers and characteristics of bank branches and of separately incorporated holding-company-owned banks are quite different.

For example, Whitney-Jefferson has its own separate capital structure and deposits; in bankruptcy a depositor would have claims against the deposits of Whitney-Jefferson alone (12 U.S.C. §§ 91, 93, 191-200; R. 389). Comprehensive provisions of law ensure against any mingling of capital, assets, or obligations of two subsidiaries of the same bank holding company, and make it impossible for them to be operated as though their resources were pooled (12 U.S.C. § 1845), or for one to incur debts based on anything but its own separate capital stock (12 U.S.C. § 82). Whitney-Jefferson can make no loan larger than $60,000, while if it were a branch of Whitney-New Orleans, it could make a loan of up to $3,000,000 (12 U.S.C. § 84; R. 389). The rights of Whitney Holding Corporation as shareholder of the two banks are quite different from

and more limited than the rights of shareholders in a single bank having more than one branch (12 U.S.C. § 61).

The decision below, moreover, cannot be reconciled with *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962), in which a claim identical to that approved in the present case was made and rejected. Perhaps the best method of demonstrating how clearly the two cases require the same result is to recite the only grounds for distinction that the court below could find. It said:

> "The Billings case is far from being factually 'on all fours' with the present case. There the company was organized in 1929, and had been operating in that capacity for 30 years. It possessed stock in 87 banks with 94 offices. Thus, it was not created or organized by a bank, as Whitney Holding was, solely for the purpose of opening a branch office of that bank. It was the traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks. It was not the type of holding company here involved, whose only capital was the money siphoned through it by Whitney-New Orleans to open Whitney-Jefferson in a prohibited location." 323 F.2d at 303, Appendix at 58.

The attempted distinction is, we submit, completely illusory. Whitney Holding Corporation precisely meets the description of "the traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks." The fact that the funds which became Whitney-Jefferson's capital came originally from Whitney-New Orleans furnishes

no ground of distinction. The court in *Billings* attached no relevance to the original source of the capital of Valley, the alleged "branch"; in fact, it never mentioned where the holding company got the funds to capitalize Valley. But since the principal source of income of bank holding companies is dividends paid by their subsidiary banks, it is overwhelmingly probable that in *Billings* the initial capital of the alleged "branch" came originally from the same source as in this case, that is, from funds available for dividends in the member banks of the holding-company system. The court in Billings regarded the decisive tests as whether the two banks did business "in the same way as if the institutions were one," 306 F.2d at 942, a test to which the original source of capital is quite irrelevant.[4]

As to the fact that the holding company in *Billings* was organized in 1929 and owns stock in 87 banks, it is difficult to see what significance the D.C. court attached to these facts. One would suppose that, if for a holding company to own two banks amounts to "branch banking," then for another holding company to own 87 banks (mostly in states which prohibit or severely limit branch banking, R. 339-342), in whose management it "participates actively," 306 F.2d at 942, would be a far more serious "evasion" of the branch-

[4] In Camden Trust Co. v. Gidney, 112 U.S. App. D.C. 197, 301 F.2d 521, *cert. denied*, 369 U.S. 886 (1962), a case identical to the present one except that the owners of the two banks were individuals rather than a corporation, the District of Columbia court itself recognized that the provisions of Federal law discussed above prevented two banks under the same ownership from being operated as though they were one. While the decision under review attempts to distinguish *Camden*, the substance and rationale of the two cases are irreconcilable.

banking law. As to the purpose for which the holding company in *Billings* was organized (a subject not considered important enough for discussion by the court in that case), the Comptroller's Annual Report for 1929, the year in which that company was organized, contained the following:

> "However, these holding companies are attempting to do under the sanction of existing laws, which are crudely adapted to the purpose, what should be made possible in a simpler manner by new legislation. If branch banking were permitted to be extended from the adequately capitalized large city banks to the outlying communities within the economic zone of operations of such banks, there would be no logical reason for the existence of the local holding company and it would give way to a system of branches operated directly by the central bank of the group.", Comptroller of the Currency, *Annual Report, 1929*, pages 4-5.

It is impossible, therefore, to avoid the conclusion that the decision in the present case has created a substantial and important conflict between the Courts of Appeals for the Ninth Circuit and the District of Columbia Circuit, which this Court should resolve.

B. THE COURT OF APPEALS SERIOUSLY DEPARTED FROM PROPER PROCEDURAL STANDARDS IN DETERMINING A DISPUTED ISSUE OF FACT ON MOTIONS FOR SUMMARY JUDGMENT.

There is probably no rule of federal civil procedure concerning which this Court has been more unequivocal and solicitous than the salutary rule that a case may not be disposed of on a motion for summary judgment if there is any disputed issue of fact re-

quiring a trial. On many occasions the Court has reversed lower-court decisions for failure to comply with this rule; *e.g., Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (an issue of intent, as in the present case); *Fountain* v. *Filson*, 336 U.S. 681; *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249; *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U.S. 426; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620. In the *Eccles* case, *supra*, the Court held that summary judgment on affidavits is particularly inappropriate when the proceedings are declaratory and equitable in nature and when issues of public importance are involved, both of which conditions are present here. 333 U.S. at 434.

The decision below presents a particularly aggravated departure from the undoubted rule, and requires correction by this Court. The basis for the holding of the Court of Appeals consisted almost entirely of factual inferences made by it from statements made by Mr. Berry, President of Whitney-New Orleans, in explaining the Whitney program to the stockholders and to the federal regulatory agencies. These statements had been filed by the parties as exhibits to their various motions and affidavits. They were not testimony; they were not made under oath; there was no opportunity for Mr. Berry to be called as a witness to explain what he had meant by them. The District Court never discussed them, since it decided the case on an issue to which they were irrelevant; the District Court's findings of fact and conclusions of law contain no mention of them. Yet the Court of Appeals drew the following inference:

> "The facts already recited sufficiently show, we think, that Whitney-New Orleans intends to do

> business through Whitney-Jefferson in the same way as if the institutions were one. The President of Whitney-New Orleans frankly made this quite clear." 323 F.2d at 303, Appendix at 58-59.

Intent, of course, is a question of fact; this Court has specifically held that summary procedures should be used sparingly "where motive and intent play leading roles." *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473. Petitioner most vigorously denies that Mr. Berry or any one else in the management of Whitney-New Orleans ever intended to operate Whitney-Jefferson "in the same way as if the institutions were one." The statements relied upon by the court do not prove this; and even if it should be thought that they permit such an inference, Whitney-Jefferson is entitled to offer evidence to rebut that inference at a trial.

The Court's treatment of Mr. Berry's statements provides an excellent example of how unsound and dangerous it is for an appellate court to speculate as to questions of fact on the basis of a bare documentary record, without a trial or any opportunity for testimony, explanation, or cross-examination. All the statements by Mr. Berry in the record, both those upon which the Court relies and those which it does not mention, may be fairly summarized as follows:

> He intended (1) not to operate Whitney-Jefferson as a branch of Whitney-New Orleans, but rather
>
> (2) to operate it as a member of the same holding-company system, in order
>
> (3) to obtain as many of the advantages of

branch banking as are available under that different system of organization.

Moreover, the sworn and uncontradicted affidavit of James Gilly, Jr., President of Whitney-Jefferson (R. 388-391), affirmatively shows that it was *not* intended to operate Whitney-Jefferson as though it and Whitney-New Orleans were one. That affidavit shows, among other things, that "Whitney-Jefferson will operate a banking house entirely separate from that of the Whitney-New Orleans" (R. 388); that Whitney-New Orleans and Whitney-Jefferson would have only one officer or employee in common, and that the two boards of directors would be by no means identical; that Whitney-Jefferson would establish correspondent banking relations not only with Whitney-New Orleans, but with other banks as well; that Whitney-Jefferson is a member in its own right of the Federal Reserve System, and has subscribed to and paid for stock in the Federal Reserve Bank of Atlanta; that Whitney-Jefferson "has and will maintain its own books of account and its own stationery, checks and forms, none of which mention Whitney-New Orleans" (R. 389); that no customer of Whitney-Jefferson would have any contractual right to make deposits at or withdraw funds from Whitney-New Orleans for his account at Whitney-Jefferson, or vice versa; and that Whitney-Jefferson would follow normal banking practices regarding accepting deposits for accounts in, and cashing checks drawn on, other banks, including Whitney-New Orleans.

In view of the uncontroverted sworn statements in this affidavit, the Court could not reasonably conclude, even if the issue were relevant and had been properly

presented, that it was intended to operate the two institutions as though they were one. "The unitary type of operation characteristic of branch banking is not present." *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F.2d 937, 943 (9th Cir. 1962).

So far from being an "undisputed fact" capable of supporting a summary judgment, Mr. Berry's supposed intent to operate the two banks as one cannot even be found as an allegation by respondents. Neither in their complaint (R. 6-20) nor in their Statement of Facts in support of their motion for summary judgment (R. 75-93) did they allege anything of the kind. Appellees did allege that Whitney-Jefferson was in law a "branch" and that the purpose of the Whitney program was to "evade" the branch banking laws; but these are patently conclusory assertions which do not amount to an allegation of fact regarding Whitney-New Orleans' intent as to how it would operate Whitney-Jefferson. Petitioner's Statement of Material Facts (R. 318-323) contained nothing concerning the intent of Whitney-New Orleans in this regard, since no allegation relating thereto had been made by the appellees and since petitioner did not believe that any such question of intent was relevant to any issue in the litigation.

The court's holding therefore rests on a finding of fact which it itself initially made, without support in the decision of the District Court; and this finding of fact is one which petitioner vigorously disputes and which, in our submission, is affirmatively refuted by the record. This procedure is wholly inadmissible, and goes far beyond the well-recognized limitations on the circumstances in which summary judgment is proper.

If a Court of Appeals, in reviewing a case in which summary judgment was granted, comes to the conclusion that the decisive issue is a question of fact which either is disputed or which has not been adequately developed in the proceeding below, the proper disposition is, of course, to remand the case to the District Court for a trial. On the view which the Court of Appeals took of the present case, that procedure should have been followed here.

C. RESPONDENTS' SOLE REMEDY IS A REVIEW PROCEEDING IN A COURT OF APPEALS AS PROVIDED IN THE BANK HOLDING COMPANY ACT.

As already noted, under the Bank Holding Company Act of 1956 it is the Federal Reserve Board that has the duty of passing upon applications for the formation of bank holding companies and for the acquisition of banks by existing bank holding companies. The Board discharged that duty in this case. Congress further provided that the Board's decisions should be subject to review in an appropriate Court of Appeals, 12 U.S.C. § 1848. The instant suit is a patent attempt to circumvent the statutory mode of review, to attack the Board's decision collaterally by the device of a suit in equity against the Comptroller of the Currency. For this reason alone, the judgment below must be reversed for lack of jurisdiction. This question will be fully treated in the petition for certiorari of the Comptroller in *James J. Saxon, Comptroller of the Currency* v. *Bank of New Orleans and Trust Co.*

CONCLUSION

Wherefore, petitioner prays that a writ of certiorari issue from this honorable Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans and Trust Co., et al.*

Respectfully submitted,

DEAN ACHESON,
W. GRAHAM CLAYTOR, JR.,
701 Union Trust Building,
Washington 5, D.C.

MALCOLM L. MONROE,
1424 Whitney Building,
New Orleans, Louisiana,
Attorneys for Petitioner.

MONROE & LEMANN,
WALTER J. SUTHON, III,
JERRY A. BROWN,
1424 Whitney Building,
New Orleans, Louisiana.

COVINGTON & BURLING,
BRICE M. CLAGETT,
701 Union Trust Building,
Washington 5, D. C.

Of Counsel.

January, 1964.

APPENDIX

STATUTES INVOLVED

§ 26. Comptroller to determine if association can commence business

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notifies the comptroller that all of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking. As amended Sept. 8, 1959, Pub.L. 86-230, § 2, 73 Stat. 457.

• • • •

§ 27. Certificate of authority to commence banking

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may with-

hold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter. R. S. § 5169.

* * * *

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * *

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided*, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined

amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock. As amended July 15, 1952, c. 753, § 2(b), 66 Stat. 633; Sept. 28, 1962, Pub.L. 87-721, 76 Stat. 667.

• • • • •

§ 1841. Definitions

(a) "Bank holding company" means any company (1) which directly or indirectly owns, controls, or holds with power to vote, 25 per centum or more of the voting shares of each of two or more banks or of a company which is or becomes a bank holding company by virtue of this chapter, or (2) which controls in any manner the election of a majority of the directors of each of two or more banks, or (3) for the benefit of whose shareholders or members 25 per centum or more of the voting shares of each of two or more banks or a bank holding company is held by trustees; and for the purposes of this chapter, any successor to any such company shall be deemed to be a bank holding company from the date as of which such predecessor company became a bank holding company. Notwithstanding the foregoing (A) no bank shall be a bank holding company by virtue of its ownership or control of shares in a fiduciary capacity, except where such shares are held for the benefit of the shareholders of such bank, (B) no company shall be a bank holding company which is registered under the Investment Company Act of 1940, and was so registered prior to May 15, 1955 (or which is affiliated with any such company in such manner as to constitute an affiliated company within the meaning of such Act), unless such company (or such affiliated company), as the case may be, directly owns 25 per centum or more of the voting shares of each of two or more banks, (C) no company shall be a bank holding company by virtue of its ownership or control of shares acquired by it in connection with its underwriting of securities and which are held only for such period of time as will permit the sale thereof upon a reasonable basis, (D) no company formed for the sole purpose of participating in a proxy solicitation shall be a bank holding company by virtue of its control of voting rights of shares acquired in

the course of such solicitation, and (E) no company shall be a bank holding company if at least 80 per centum of its total assets are composed of holdings in the field of agriculture.

(b) "Company" means any corporation, business trust, association, or similar organization, but shall not include (1) any corporation the majority of shares of which are owned by the United States or by any State, or (2) any corporation or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, or (3) any partnership.

(c) "Bank" means any national banking association or any State bank, savings bank, or trust company, but shall not include any organization operating under sections 611 and 612 of this title, or any organization which does not do business within the United States. "State member bank" means any State bank which is a member of the Federal Reserve System. "District bank" means any State bank organized or operating under the Code of Law for the District of Columbia.

(d) "Subsidiary", with respect to a specified bank holding company, means (1) any company 25 per centum or more of whose voting shares (excluding shares owned by the United States or by any company wholly owned by the United States) is owned or controlled by such bank holding company; or (2) any company the election of a majority of whose directors is controlled in any manner by such bank holding company; or (3) any company 25 per centum or more of whose voting shares are held by trustees for the benefit of the shareholders or members of such bank holding company.

(e) The term "successor" shall include any company which acquires directly or indirectly from a bank holding company shares of any bank, when and if the relationship between such company and the bank holding company is such that the transaction effects no substantial change in the control of the bank or beneficial ownership of such shares of such bank. The Board may, by regulation, further define the term "successor" to the extent necessary to prevent evasion of the purposes of this chapter.

(f) "Board" means the Board of Governors of the Federal Reserve System.

(g) "Agriculture," as used in subsection (a) of this section, includes farming in all its branches including fruit-growing, dairying, the raising of livestock, bees, fur-bearing animals, or poultry, forestry or lumbering operations, and the production of naval stores, and operations directly related thereto. May 9, 1956, c. 240, § 2, 70 Stat. 133.

* * * *

§ 1842. Acquisition of bank shares or assets—prior approval of Board as necessary; exceptions

(a) It shall be unlawful except with the prior approval of the Board (1) for any action to be taken which results in a company becoming a bank holding company under section 1841(a) of this title; (2) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (3) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (4) for any bank holding company to merge or consolidate with any other bank holding company. Notwithstanding the foregoing this prohibition shall not apply to (A) shares acquired by a bank, (i) in good faith in a fiduciary capacity, except where such shares are held for the benefit of the shareholders of such bank, or (ii) in the regular course of securing or collecting a debt previously contracted in good faith, but any shares acquired after May 9, 1956 in securing or collecting any such previously contracted debt shall be disposed of within a period of two years from the date on which they were acquired; or (B) additional shares acquired by a bank holding company in a bank in which such bank holding company owned or controlled a majority of the voting shares prior to such acquisition.

Application for approval; notice to Comptroller of Currency or State authority; disapproval; hearing; order of Board

(b) Upon receiving from a company any application for approval under this section, the Board shall give notice to the Comptroller of the Currency, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a national banking association or District bank, or to the appropriate supervisory authority of the interested State, if the applicant company or any bank the voting shares or assets of which are sought to be acquired is a State bank, and shall allow thirty days within which the views and recommendations of the Comptroller of the Currency or the State supervisory authority, as the case may be, may be submitted. If the Comptroller of the Currency or the State supervisory authority so notified by the Board disapproves the application in writing within said thirty days, the Board shall forthwith give written notice of that fact to the applicant. Within three days after giving such notice to the applicant, the Board shall notify in writing the applicant and the disapproving authority of the date for commencement of a hearing by it on such application. Any such hearing shall be commenced not less than ten nor more than thirty days after the Board has given written notice to the applicant of the action of the disapproving authority. The length of any such hearing shall be determined by the Board, but it shall afford all interested parties a reasonable opportunity to testify at such hearing. At the conclusion thereof, the Board shall by order grant or deny the application on the basis of the record made at such hearing.

Factors governing determination of application for approval

(c) In determining whether or not to approve any acquisition or merger or consolidation under this section, the Board shall take into consideration the following factors: (1) the financial history and condition of the company or companies and the banks concerned; (2) their prospects; (3) the character of their management; (4) the convenience, needs, and welfare of the communities and the area concerned; and (5) whether or not the effect of such acquisi-

tion or merger or consolidation would be to expand the size or extent of the bank holding company system involved beyond limits consistent with adequate and sound banking, the public interest, and the preservation of competition in the field of banking.

Limitation by State boundaries

(d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. May 9, 1956, c. 240, § 3, 70 Stat. 134.

* * * * * *

§ 1845. Investments and borrowing by subsidiaries—Securities of parent holding company or other subsidiary, collateral security; purchase of securities under repurchase agreement; loans, discount or extension of credit

(a) From and after May 9, 1956, it shall be unlawful for a bank—

(1) to invest any of its funds in the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary, or of any other subsidiary of such bank holding company;

(2) to accept the capital stock, bonds, debentures, or other obligations of a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company, as collateral security for advances made to any person or company: *Provided, however*, That any bank may accept such capital stock, bonds, debentures, or other obligations as security for debts previously contracted, but such collateral shall not be held for a period of over two years;

(3) to purchase securities, other assets or obligations

under repurchase agreement from a bank holding company of which it is a subsidiary or any other subsidiary of such bank holding company; and

(4) to make any loan, discount or extension of credit to a bank holding company of which it is a subsidiary or to any other subsidiary of such bank holding company.

Non-interest-bearing deposits to the credit of a bank shall not be deemed to be a loan or advance to the bank of deposit, nor shall the giving of immediate credit to a bank upon uncollected items received in the ordinary course of business be deemed to be a loan or advance to the depositing bank.

Exemptions

(b) The provisions of this section shall not apply (1) to the capital stock, bonds, debentures, or other obligations of any company described in section 1843(c) (1) of this title, or (2) to any company whose subsidiary status has arisen out of a bona fide debt to the bank contracted prior to the date of the creation of such status, or (3) to any company whose subsidiary status exists by reason of the ownership or control of voting shares thereof by the bank as executor, administrator, trustee, receiver, agent, or depositary, or in any other fiduciary capacity, except where such shares are held for the benefit of all or a majority of the stockholders of such bank. May 9, 1956, c. 240, § 6, 70 Stat. 137.

§ 1846. Reservation of rights to States

The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. May 9, 1956, c. 240, § 7, 70 Stat. 138.

§ 1847. Penalties

Any company which willfully violates any provision of this chapter, or any regulation or order issued by the Board pursuant thereto, shall upon conviction be fined not more than $1,000 for each day during which the violation continues. Any individual who willfully participates in a violation of any provision of this chapter shall upon conviction be fined not more than $10,000 or imprisoned not

more than one year, or both. Every officer, director, agent, and employee of a bank holding company shall be subject to the same penalties for false entries in any book, report, or statement of such bank holding company as are applicable to officers, directors, agents, and employees of member banks for false entries in any books, reports, or statements of member banks under section 1005 of Title 18. May 9, 1956, c. 240, § 8, 70 Stat. 138.

§ 1848. Judicial review

Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within sixty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and file in the court a transcript of the record made before the Board. Upon the filing of the transcript the court shall have jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper. The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive. May 9, 1956, c. 240, § 9, 70 Stat. 138.

* * * *

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, APPELLANT,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY ET AL., APPELLEES

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, APPELLANT,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY ET AL., APPELLEES

Nos. 17672, 17681

United States Court of Appeals District of Columbia Circuit.

Argued May 24, 1963.

Decided Aug. 14, 1963.

Petition for Rehearing En Banc Denied Oct. 17, 1963.

* * * *

Mr. Dean Acheson, Washington, D. C., with whom Messrs. W. Graham Claytor, Jr., and Brice M. Clagett, Washington, D. C., were on the brief, for appellant in No. 17,672.

Mr. David L. Rose, Atty., Dept. of Justice, with whom Messrs. David C. Acheson, U. S. Atty., and Joseph D. Guilfoyle, Director of Operations, Civil Div., Dept. of Justice, and Morton Hollander, Atty., Dept. of Justice, were on the brief, for appellant in No. 17,681.

Mr. Edward L. Merrigan, Washington, D. C., for appellee Bank of New Orleans & Trust Co. and certain other appellees.

Mr. Bentley G. Byrnes, New Orleans, La., with whom Mr. Edward L. Merrigan, Washington, D. C., was on the brief, for appellee Louisiana State Bank Commissioner.

Mr. James F. Bell, Washington, D. C., filed a brief on

behalf of the National Ass'n of Supervisors of State Banks, as amicus curiae, urging affirmance.

Before WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

WILBUR K. MILLER, Circuit Judge.

The City of New Orleans, Louisiana, is co-terminous with the Parish of Orleans in which it is located. It is south of and adjacent to that part of Jefferson Parish which lies east of the Mississippi River. The latter is a populous area, already commercially and industrially active, in which further development is expected to be rapid and extensive.

The Whitney National Bank of New Orleans, by far the largest bank in Louisiana, with its main office and numerous branches in Orleans Parish, draws a substantial volume of business from customers in east Jefferson Parish. For some time it has desired to extend its operations into that area, but cannot establish branches therein because a Louisiana statute,[1] which is construed as forbidding such expansion by state banks, is made applicable to national banks in Louisiana by a federal statute.[2]

---

[1] 2 LSA-R.S. 6:54 (1951).

[2] Title 12 U.S.C. § 36 provides in pertinent part.

"*Branch banks*

"The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

* * * * * * *

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and

After several years of studying alternate methods of doing indirectly what these statutes prohibited it from doing directly, The Whitney National Bank of New Orleans finally decided upon a corporate reorganization, the details of which included the formation of a holding company to own two new national banks: Crescent City National Bank, a mere conduit to exist temporarily in name only, and Whitney National Bank in Jefferson Parish, to be operated as we shall describe. All three new organizations were to be financed with funds furnished by Whitney of New Orleans.

Through elaborate maneuvers which will be explained later, the result would be that Whitney Holding Corporation would own all the stock, except qualifying shares, of Whitney of New Orleans and Whitney, in Jefferson Parish; and the shares of Whitney Holding Corporation would be owned by the shareholders of the original Whitney of New Orleans in the same proportion as before. The holding company feature of the plan required the approval of the Board of Governors of the Federal Reserve System, and the remainder of it required the approval of the Comptroller of the Currency.

Commenting on the proposed plan, Whitney's president on October 28, 1961, advised his shareholders it had been decided to use the holding company device instead of the "affiliated" bank plan which we approved in the Camden Trust case[3] largely because, under the latter arrange-

---

subject to the restrictions as to location imposed by the law of the State on State banks. * * *

* * * * * * * *

"(e) No branch of any national banking association shall be established * * * without first obtaining the consent and approval of the Comptroller of the Currency.

"(f) The term 'branch' as used in this section shall be held to include *any branch bank, branch office, branch agency, additional office, or any branch place of business* located in any State * * * at which deposits are received, or checks paid, or money lent." (Emphasis supplied.)

[3] Camden Trust Company v. Gidney, 112 U.S.App.D.C. 197, 301 F.2d 521, cert. denied, 369 U.S. 886, 82 S.Ct. 1158, 8 L.Ed.2d 287 (1962).

ment, it is impossible to attain and preserve identity of ownership of the two banks. He said:

> "* * * From the depositors [*sic*] point of view, those in the smaller bank will be assured of the same management which directs the larger one without possibility of interruption. They will be assured of access to the large loan limits of the combined banks. They will have the security which arises out of the fact that the large and the small bank have identical ownership as well as management.
>
> "We * * * elected to use a holding company rather than to get a group of stockholders to form an affiliate in Jefferson Parish. An affiliate by law must depend on ownership of a majority of the stock in the Jefferson Parish bank by Whitney Bank stockholders. Affiliate relationship can be suddenly terminated if stock ownership in the Jefferson Parish bank changes over a period of time until control ceases to be in the stockholders of the large New Orleans bank. This large bank cannot control those changes in stock ownership, and under the law when the control ceases to be in the stockholders of the large bank the two banks cannot have common officers or directors. As we view it, the change of ownership of the stock could be very embarrassing to either or both banks,—even to the extent of having a bank which we no longer control still bearing the name 'Whitney National Bank.'
>
> "Under the holding company approach the relationship is completely owned by the stockholders of the holding company who will be all the present stockholders of the Whitney National Bank and their successors.
>
> "By reason of the common ownership of the two banks in a holding company there can arise no conflict of interest between them as there can between affiliated banks. There will be no minority stockholders to be affected.
>
> "From the customer point of view there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the commonly owned banks in the two parishes. He

will have the full benefit of a relationship with the large bank and its officers.

"Because of the permanent relationship between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization."

This plan was carried out almost completely. Whitney of New Orleans organized the Whitney Holding Corporation with $350,000 initial capital furnished by it, with which Whitney Holding acquired the "phantom"[4] Crescent City National Bank. The Whitney Bank then by consolidation transferred its assets to Crescent City National Bank (owned by Whitney Holding) and immediately changed Crescent City's name to The Whitney National Bank of New Orleans. Then the new Whitney of New Orleans furnished the Holding Corporation with $650,000[5] with which the latter organized The Whitney National Bank in Jefferson Parish. And all the Holding Corporation's capital stock was distributed proportionately to the stockholders of the original Whitney of New Orleans.

All this was done with the approval of the Board of Governors of the Federal Reserve System (which had the duty of passing on the validity of the holding company arrangement) and of the Comptroller of the Currency. The only step not yet taken is the Comptroller's issuance to The Whitney National Bank in Jefferson Parish of a Certificate of Authority which will enable it to begin business.

On June 9, 1962 three Louisiana state banks[6] filed this

---

[4] It was so characterized by the Federal Reserve Board of Governors. Crescent City never opened for business and was not intended to do so.

[5] This payment was described as a dividend.

[6] Bank of New Orleans and Trust Company, located in Orleans Parish, Merchants Trust and Savings Bank, located in the eastern portion of Jefferson Parish, and Guaranty Bank and Trust Company, located in Lafayette Parish.

On June 26, 1962, Merchants Trust and Savings Bank moved, in its own behalf only, to dismiss the action and so withdrew as a party plaintiff. The Bank of Louisiana in New Orleans was

suit against the Comptroller of the Currency, James J. Saxon, in the United States District Court for the District of Columbia. Their complaint, after describing Whitney's plan of reorganization and the various steps already taken pursuant to it, alleged that the Comptroller

> "(19.) • • • is presently considering almost immediate issuance of his Certificate or Certificates of Authority which will enable the new branch bank facility to open and commence to operate a banking business at one or more locations in Jefferson Parish under the name of Whitney National Bank of Jefferson Parish.
>
> "(20.) Plaintiffs verily believe that defendant, unless enjoined, will, without any notice of intention to plaintiffs, issue in the name of Whitney National Bank of New Orleans, or Whitney Holding Corporation, or Whitney National Bank of Jefferson Parish the aforesaid Certificate or Certificates of Authority, all in contravention of the letter, intent and purposes of Title 12 U.S.C. §§ 27, 36 and 1841, et seq., and that after said Certificate or Certificates are issued as aforesaid, plaintiffs will have no adequate remedy at law, either to compel revocation of same or to prevent the Whitney Bank from so operating in Jefferson Parish.
>
> "(21.) Plaintiffs further allege that the unlawful and arbitrary issuance by defendant of his certificate or certificates, authorizing the Whitney National Bank to open and operate a new branch facility or facilities in Jefferson Parish as aforesaid will cause great and irreparable damage to the banking business of said plaintiffs • • •."

The relief prayed for was a declaration that 12 U.S.C. §§ 27, 36 and 1841 et seq., prohibit the Comptroller from

allowed to intervene as a plaintiff on July 5, and on July 10 intervention of Whitney of Jefferson Parish as a defendant was permitted. On September 7, 1962, the State Bank Commissioner was allowed to intervene as a plaintiff. The District Court on September 26, 1962, granted the motion of National Association of Supervisors of State Banks for permission to appear as *amicus curiae*.

issuing a Certificate of Authority to the newly-organized Whitney-Jefferson bank, and that he be preliminarily and permanently enjoined

> "* * * from issuing to the Whitney National Bank, also known by the name of Crescent City National Bank, the Whitney Holding Corporation and/or the Whitney National Bank of Jefferson Parish, a Certificate or Certificates of Authority authorizing the establishment of new branch bank facilities by them or any of them in the name of Whitney National Bank or otherwise in Jefferson Parish, State of Louisiana * * *."

After the complaint was filed, the Comptroller at first voluntarily withheld issuance of a Certificate of Authority to Whitney-Jefferson, but later indicated he would do so no longer. As a consequence, the plaintiffs moved for a temporary restraining order which was issued by District Judge Hart June 27, 1962; and on July 10, 1962, District Judge Holtzoff entered a preliminary injunction in accordance with the prayer of the complaint.

Meanwhile the Louisiana legislature of 1962 adopted a State Bank Holding Company Act, being Act 275,[7] which the Governor designated as emergency legislation so that it became effective July 10, 1962. Section 3(5) of that Act (6:1003(5)) is in pertinent part as follows:

> "It shall be unlawful:
>
> * * * * * * *
>
> "(5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not a charter, permit, license or certificate to open for business has already been issued * * *."

Admittedly, this measure was passed to prohibit the opening of Whitney-Jefferson.

Numerous pleadings, affidavits and other documents were filed by the various parties, including the opinion of the Board of Governors of the Federal Reserve System ap-

---

[7] Now codified as 2 LSA-R.S. 6:1001-6:1006 (1962 Supp.).

proving Whitney Holding Corporation's acquisition of the Whitney National Bank of New Orleans, as reorganized, and Whitney National Bank in Jefferson Parish, and Governor Robertson's dissent from that action.

Cross motions for summary judgment, the Comptroller's motion to dismiss, and the plaintiffs' motion for a permanent injunction came on for hearing before District Judge McLaughlin on October 10, 1962. He filed a memorandum opinion holding that Louisiana Act 275 § 3(5) makes it unlawful for Whitney-Jefferson to commence business, and that the Comptroller should be enjoined from issuing to it a Certificate of Authority to open its doors. Having so concluded, Judge McLaughlin deemed it unnecessary to consider whether the establishment of Whitney-Jefferson violated 12 U.S.C. § 36(c). His opinion is reported in 211 F.Supp. 576 (1962).

Findings of fact and conclusions of law were filed by Judge McLaughlin December 5, 1962. The findings include the following:

> "4. Intervening defendant, Whitney National Bank in Jefferson Parish (Whitney-Jefferson), is a national banking association and a wholly owned subsidiary of Whitney Holding Corporation (Whitney Holding), a bank holding company incorporated under the laws of Louisiana.
>
> "5. Whitney National Bank of New Orleans (Whitney-New Orleans), not a party to this suit, is also a national banking association and a wholly owned subsidiary of Whitney Holding.
>
> "6. Whitney-New Orleans, created approximately 79 years ago, is the largest bank in Louisiana and one of the largest financial institutions in the southern portion of the United States, and presently conducts its business only in Orleans Parish (a political subdivision co-terminous with the City of New Orleans).
>
> "7. For a long period of years, Whitney-New Orleans has been desirous of expanding its banking operations into Jefferson Parish, Louisiana, a neighboring parish or county, but was prohibited by the operation of 12 U.S.C. § 36(c) and Louisiana Revised Statutes, Title 6, § 54, from establishing branch facilities outside of Orleans Parish. In an effort to ac-

complish its desired objective, Whitney-New Orleans decided to utilize the device of a bank holding company.

"8. The management of Whitney-New Orleans thereupon obtained from the Comptroller of the Currency informal approval of its desire to expand banking operations into Jefferson Parish through the formation of a bank holding company and set into motion the following proposed steps designed to accomplish such purpose:

"*First:* With $350,000. of its funds, Whitney-New Orleans created Whitney Holding, and distributed the 5,600 shares it received in Whitney Holding to its stockholders.

"*Second:* Whitney Holding invested the $350,000. provided by Whitney-New Orleans in a new national banking association, Crescent City National Bank, and received in return all of the shares of stock in Crescent City National Bank.

"*Third:* Whitney-New Orleans, Crescent City National Bank and Whitney Holding then entered into an agreement whereby Whitney-New Orleans was consolidated into Crescent City National Bank under the name Whitney-New Orleans, and Whitney Holding became the owner of all of the shares in the consolidated banks and the stockholders of the original Whitney-New Orleans received the remainder of the stock in Whitney Holding.

"*Fourth:* Whitney-New Orleans then provided $650,000. to Whitney Holding with which to purchase all of the stock in Whitney-Jefferson.

"9. On October 3, 1961, defendant Comptroller gave preliminary approval to the formation of the Crescent City National Bank and the Whitney National Bank in Jefferson Parish, Louisiana, subject to approval by the Federal Reserve Board of the application of Whitney Holding to become a bank holding company under the Bank Holding Company Act of 1956.

"10. On May 3, 1962, the Federal Reserve Board approved the application of Whitney Holding.

"11. Subsequently, defendant Comptroller then approved the consolidation of the existing Whitney-New

Orleans into the Crescent City National Bank under the original name of Whitney-New Orleans, and this was accomplished.

"12. Whitney Holding thereupon purchased all of the stock of Whitney-Jefferson for $650,000., by which time the Articles of Association and the Certificate of Organization of Whitney-Jefferson had been executed and filed with defendant Comptroller.

"13. On June 9, 1962, before defendant Comptroller could issue a Certificate of Authority authorizing Whitney-Jefferson to commence the business of banking in Jefferson Parish, Louisiana, this suit was instituted.

"14. Defendant Comptroller voluntarily withheld issuance of a Certificate of Authority until June 27, 1962, when a temporary restraining order was issued by this Court. After hearing, a preliminary injunction was ordered granted on July 6, 1962, and was signed and filed on July 10, 1962.

"15. On the same date, July 10, 1962, Louisiana Act 275 of 1962 became effective as the law of Louisiana.

Section 3(5) of said Act provides:

> "'It shall be unlawful • • • (5) for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not a charter, permit, license or certificate to open for business has already been issued.'

• • • • • • •

"18. Plaintiffs and intervening plaintiffs have presented sworn, uncontroverted facts to show that, if defendant Comptroller is not prohibited from issuing his Certificate of Authority to Whitney-Jefferson, each plaintiff bank will sustain irreparable injury and damage in excess of $10,000., exclusive of interest and costs."

Among the court's conclusion of law are the following:

"2. Defendant Comptroller of the Currency has no discretion to issue a Certificate of Authority to a national banking association to commence a banking business in a manner prohibited by law (Commercial State

Bank v. Gidney, 174 F.Supp. 770, 778, affd. [108 U.S. App.D.C. 37,] 278 F.2d 871 (D.C.App.1960); Camden Trust Co. v. Gidney, [112 U.S.App.D.C. 197,] 301 F.2d 521 (D.C.App.), cert. denied, 369 U.S. 886, [82 S.Ct. 1158, 8 L.Ed.2d 287] (1962); Gidney v. Wayne Oakland Bank, 252 F.2d 537 (C.C.A.6), cert. denied, 358 U.S. 830 [79 S.Ct. 50, 3 L.Ed.2d 69] (1958)).

"3. The Federal Bank Holding Company Act, at 12 U.S.C. § 1846, reserved to the States such powers and jurisdiction as they had or might exercise in the future with respect to banks, bank holding companies and subsidiaries of bank holding companies and Section 3(5) of Louisiana Act 275 of 1962 was enacted pursuant to and within the scope of the said powers and jurisdiction so reserved to the States by Congress, and said statute is constitutional (Braeburn Securities Corp. v. Smith, [15 Ill.2d 55,] 153 N.E.2d 806, appeal dismissed for want of a substantial Federal question, 359 U.S. 311 [79 S.Ct. 876, 3 L.Ed.2d 831] (1959); Opinion of the Justices, [102 N.H. 106,] 151 A.2d 236 (N.H.1959); also 12 U.S.C. § 1842(d), Federal Bank Holding Company Act)).

"4. Act 275 of 1962 is directly applicable to intervening defendant, Whitney National Bank in Jefferson Parish, a wholly owned subsidiary of a Louisiana-incorporated bank holding company, and said statute makes it unlawful for said intervening defendant to commence the business of banking in Louisiana. Accordingly, defendant Comptroller of the Currency should be permanently enjoined and restrained from issuing a Certificate of Authority licensing Whitney Jefferson to commence such unlawful operations (Commercial State Bank v. Gidney, supra; Wayne Oakland Bank v. Gidney, supra).

"5. Plaintiff and intervening plaintiff banks, faced with proposed invasion of property rights and injury from the proposed unlawful issuance by defendant Comptroller of a Certificate of Authority to intervening defendant Whitney-Jefferson, have standing to bring this suit, and they have no other adequate remedy at law (Wisconsin Bankers Association v. Robertson, 190 F.Supp. 90, 94, affd. [111 U.S.App.D.C. 85] 294 F.2d 714 (App.D.C.), cert. denied 368 U.S. 938, [82

S.Ct. 381, 7 L.Ed.2d 338,] rehearing denied 368 U.S. 979, [82 S.Ct. 477, 7 L.Ed.2d 441] (1961); Commercial State Bank v. Gidney, supra; Wayne Oakland Bank v. Gidney, supra.)

* * * * * * *

"7. The cross motions for summary judgment of plaintiffs and intervening plaintiff should be and are granted; and the motions for summary judgment of the defendant and intervening defendant and the cross motion to dismiss by defendant Comptroller should be, and are, denied."

Judgment was entered in accordance with the conclusions. Whitney-Jefferson filed notice of appeal therefrom on January 31, 1963, and the Comptroller's notice of appeal was filed February 1, 1963. That explains why there are two separately styled and numbered proceedings in this court in what is in reality a single appeal.

In the brief for the Comptroller it is argued vigorously and at some length that the appellees have no standing to challenge his administrative determination to issue a Certificate of Authority to Whitney-Jefferson.[8] The only purpose of the state banks in filing this suit, says his brief, is to avoid the lessening of business and profits which might result from the presence of a new competing institution in the area; but, he continues, possible economic disadvantage from competition is not enough, absent a special Congressional grant of standing, to permit the disadvantaged party to invoke the jurisdiction of the courts.

[1] We were told by his counsel on oral argument, however, that the Comptroller had instructed him not to press the lack of standing argument, as he desired a ruling on the merits. If we could accept the Comptroller's offer to waive the point concerning standing, this opinion would be substantially shortened, as the discussion of the merits, when reached, will not detain us long. The point cannot be thus waived by the Comptroller because it is jurisdic-

[8] It is interesting to observe that the other appellant, Whitney-Jefferson, does not argue or even suggest that the state banks lack standing to sue.

tional: if the appellees lack standing to sue, their complaint should have been dismissed on that ground. Jurisdiction cannot be conferred by waiver; it is a threshold question which must be examined.

[2] The Comptroller's brief contends that "appellees can point to no legal or actionable wrong to them arising from the opening of a new national bank." If is, of course, true, as held in Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374 (1938), that one who has no contractual or statutory right to be free of competition, and no property right which would be infringed thereby, has no standing to challenge federal administrative action which simply increases the amount or effectiveness of competition. And we held in Union Nat. Bank of Clarksburg v. Home Loan Bank Bd., 98 U.S.App.D.C. 204, 233 F.2d 695 (1956), that, in the circumstances of that case, existing banks had no standing to challenge the Home Loan Bank Board's issuance of a charter to a proposed savings and loan association. In that case, the complaining banks were relying on a provision of the Home Owners' Loan Act that

> "No charter shall be granted • • unless in the judgment of the Board a necessity exists for such an institution in the community to be served • • • nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions."

We held that the complaining banks were not "local thrift and home-financing institutions" and so were not protected by the statute from the competition of a lawfully established federal savings and loan association.

These and similar cases do not apply here because the applicable statutes and the facts of this case are different.[9] For instance, the appellees, Bank of New Orleans and Trust Company and Bank of Louisiana in New Orleans, are state banks having their principal and branch offices in Orleans

---

[9] Our decision in Kansas City Power & Light Co. v. McKay, 96 U.S.App.D.C. 273, 225 F.2d 924, cert. denied, 350 U.S. 884, 76 S.Ct. 137, 100 L.Ed.2d 780 (1955), for example, involved federal competition sanctioned by Congress, while the competition here is private, and not so sanctioned.

Parish. They derive substantial volumes of business from the contiguous "east bank" portion of Jefferson Parish but are prohibited by Louisiana law from establishing branches there or in any parish other than Orleans.

They allege that Whitney, with its main office in Orleans Parish but also with substantial business from east Jefferson Parish, is subject to the same restriction as to the establishment of outside branches because 12 U.S.C. § 36(c) makes the Louisiana statute applicable to national banks. The state banks say that thus they have a right, under the combination of federal and state statutes, to be free of the competition in east Jefferson Parish which would result if Whitney or Orleans Parish is allowed to establish branches in east Jefferson where the state law forbids them to go. The state banks allege further that the Comptroller is not authorized to permit, but rather is prohibited by law from permitting, Whitney of New Orleans to establish branches in east Jefferson, and that his unlawful act in doing so would result in illegal competition and a consequent violation of their right, guaranteed by state and federal statutes, to be free of such competition.

The other appellee state bank is in nearby Lafayette Parish and has substantial business from east Jefferson which would be diminished by the unlawful competition of Whitney National's branches.

[3, 4] Clearly, then, under the allegations of their complaint, the three state banks have standing. It is not enough to say *contra* that the Whitney-Jefferson bank will not be a branch of Whitney New Orleans and that, therefore, the state banks have no legal right to protection against its establishment and consequently no standing to sue. For, whether or not Whitney-Jefferson will in legal effect be a branch of Whitney-New Orleans is the question tendered for adjudication, upon which under the circumstances the question of standing in part depends. If it is determined that Whitney-Jefferson is not a branch, it might or might not follow that the state banks had no standing—a matter on which we need not pass; but if it is held to be tantamount to a branch purporting to have been federally authorized, their standing would be indubitable.

[5] Nor is it an answer to say that the state banks may utilize the holding company device to enter east Jefferson

Parish, just as Whitney-New Orleans is attempting to do. Regardless of whether Act 275 of the 1962 Louisiana legislature is a direct prohibition against the opening of the new Whitney-Jefferson, unquestionably it effectively prevents the appellee state banks from opening new banks in Jefferson Parish through the medium of holding companies or otherwise. So, the complaint is that the Comptroller has permitted Whitney-New Orleans to organize a new branch in east Jefferson through the use of a holding company device which Louisiana law forbids a state bank to employ, and is about to authorize its opening.

The distinction between this case and those cited by the Comptroller as to standing to sue was carefully drawn by the Supreme Court in Alabama Power Co. v. Ickes, supra, 302 U.S. at page 484, 58 S.Ct. at page 306, 82 L.Ed. 374 (one of his citations), when it said:

> "Frost v. Corporation Commission, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483, relied upon by petitioner, presents an altogether different situation. Appellant there owned a cotton-ginning business in the city of Durant, Oklahoma, for the operation of which he had a license from the corporation commission. The law of Oklahoma provided that no gin should be operated without a license from the commission, which could be obtained only upon specified conditions. We held that such a license was a franchise constituting a property right within the protection of the Fourteenth Amendment; and that while the acquisition of the franchise did not preclude the state from making similar valid grants to others, *it was exclusive against an attempt to operate a competing gin without a permit or under a void permit.* The Durant Co-operative Gin Company sought to obtain a permit from the commission which, for reasons stated in our opinion, we held would be void and a clear invasion of Frost's property rights. *We concluded that a legal right of Frost to be free from such competition would be invaded by one not having a valid franchise to compete,* and sustained Frost's right to an injunction against the commission and the Durant company. See Corporation Commission v. Lowe, 281 U.S. 431, 435, 50 S.Ct. 397, 74 L.Ed. 945. *The difference between the Frost case and this is fundamental; for the competition contemplated there was*

unlawful while that of the municipalities contemplated here is entirely lawful." (Emphasis supplied.)

Although the Frost case is not factually identical with this one, it is sufficiently similar to be dispositive of the question of standing. The charters of the appellee banks, granted by the State of Louisiana, are guarded by a combination of specifically applicable federal and state statutes. The appellee banks cannot complain of lawful competition from other lawfully chartered state or national banks because their own charters are not exclusive licenses. But where, as here, the threatened competition arises from an allegedly illegal facility, the appellee state banks have standing to invoke the jurisdiction of a federal court to challenge the alleged unlawful federal administrative action which admittedly would result in irreparable injury to their property rights in their charters.

[6] The Comptroller asserts he has discretion as to whether to issue a Certificate of Authority to a new national bank which cannot be judicially controlled. The same contention was made in Commercial State Bank of Roseville v. Gidney, 174 F.Supp. 770 (D.C.D.C.1959), where two state banks within two and one-half miles of a proposed national bank branch sought to enjoin the then Comptroller from authorizing the unlawful competition which threatened them with immediate and irreparable injury. Uncontroverted affidavits showed that the town of Clinton, site of the proposed branch, could not itself support the new facility, which would therefore necessarily draw its business from the surrounding communities already served by the complaining state banks. District Judge Youngdahl brushed aside the Comptroller's discretion argument by saying, at page 778:

> "Defendant argues that the approval or disapproval of branches of national banks is a matter clearly committed to the *discretion* of the Comptroller. But there is *no discretion* in the Comptroller to approve the establishment of a branch office at a location prohibited by law. * * * In the instant case, there is no desire to control the defendant's discretion * * *. But, as mentioned above, there is *no discretion* to unlawfully issue a certificate. * * *" (Emphasis added.)

We affirmed Judge Youngdahl's decision. 108 U.S.App.D.C. 37, 278 F.2d 871 (1960).

In the case of National Bank of Detroit v. Wayne Oakland Bank, 252 F.2d 537, at page 544, cert. denied 358 U.S. 830, 79 S.Ct. 50, 3 L.Ed.2d 69 (1958), the Sixth Circuit said:

> "• • • The district court found, as a fact, that the competition resulting from the opening and operation of a branch by the National Bank of Detroit would certainly cause inestimable damage to The Wayne Oakland Bank. Whether the rights of a party are infringed by unlawful action of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated."

Judge Tamm of our District Court held in Wisconsin Bankers Association v. Robertson, 190 F.Supp. 90 (1960), that national and state banks of Wisconsin collectively have the exclusive right to conduct the business of banking in that state, which gave them standing to challenge alleged competition in that business by federal savings and loan associations.[10]

In sum, we have no doubt that the three state banks[11] had standing to sue the Comptroller in this action in order to test the legality of his proposed action. This conclusion makes it unnecessary to decide whether the Louisiana State Bank Commissioner had standing to sue.

We turn to the question on the merits: whether the District Court was correct in permanently restraining and enjoining the Comptroller from issuing a Certificate of Authority to Whitney Jefferson. If Whitney-Jefferson, in its organization, management and operation, would be to all intents and purposes a branch of Whitney-New Orleans forbidden by 12 U.S.C. § 36(c), the authority of the District Court to enjoin him from issuing a Certificate of Authority is quite clear.

---

[10] We affirmed; no cross appeal was filed. 111 U.S.App.D.C. 85, 294 F.2d 714, cert. denied 368 U.S. 938, 82 S.Ct. 381, 7 L.Ed.2d 338 (1961), rehearing denied 368 U.S. 979, 82 S.Ct. 477, 7 L.Ed.2d 441 (1962).

[11] The District Court's finding of fact No. 18 showed their irreparable injury.

Since Whitney-Jefferson clearly is not an affiliate, the question is whether the elaborate and ingenious scheme of reorganization devised by Whitney-New Orleans results in what is in reality the establishment of a branch of Whitney-New Orleans in east Jefferson Parish, in violation of federal law.

[7] There was actually no pretense about the matter: Whitney of New Orleans frankly proposed to evade the statutes by establishing through the holding company arrangement an office in east Jefferson Parish which it would manage and control. Its president said on October 27, 1961, in his communication to Whitney-New Orleans stockholders which explained in detail the plan of reorganization:

> "The basic purpose of the program is to allow the Whitney organization in New Orleans to commence a Holding Company operation controlling a bank in East Jefferson Parish to protect Whitney's competitive position in that area into which many of Whitney's present customers have moved."

On October 28, 1961, he wrote to his stockholders:

> "* * * From the depositors [*sic*] point of view, those in the smaller bank will be assured of the *same management* which directs the larger one without possibility of interruption. They will be assured of access to the large loan limits of *the combined banks*. They will have the security which arises out of the fact that *the large and the small bank have identical ownership as well as management*.
>
> * * * * * * * * *
>
> "From the customer point of view there will be no conflict of interest arising out of the manner in which the customer sees fit to divide his business between the commonly owned banks in the two parishes. *He will have the full benefits of a relationship with the large bank* and its officers.
>
> "Because of *the permanent relationship* between the large and the smaller bank, the smaller one can operate safely with a smaller capitalization." (Emphasis supplied.)

This is a very good description of a branch banking operation, regardless of the fact that Whitney's president did not denominate it as such. The nature of the arrangement, and not the label applied to it, determines the character of the relationship between two banking institutions. In 12 U.S.C. § 36 Congress gave a broad meaning to the word "branch":

> "(f) The term 'branch' as used in this section shall be held to include *any branch bank, branch office, branch agency, additional office, or any branch place of business* located in any State • • • at which deposits are received, or checks paid, or money lent." (Emphasis supplied.)

The Board of Governors of the Federal Reserve System, although it approved the application of Whitney Holding Corporation to acquire the capital stock of Whitney-New Orleans and Whitney-Jefferson, was under no illusion as to the true nature of the transaction. It said:

> "Under the law of Louisiana, a bank may not establish branches outside of the parish in which its head office is situated. • • • •
>
> • • • • • • •
>
> "• • • *The stated purpose of the proposed holding company system is to enable an organization centered about Whitney-New Orleans to provide banking services not only through its existing 12 offices within the City of New Orleans but also through offices in the East Bank of Jefferson Parish.* The holding company system will be under the direction of the present executive management of Whitney New Orleans; *in fact, for present purposes the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank.* Consequently, the character of the management and the prospects of the Applicant and its two proposed subsidiary banks may be evaluated largely on the basis of the financial history and condition, character of the management, and prospects of Whitney New Orleans.
>
> "The financial history of Whitney New Orleans

has been satisfactory. The condition of that bank is sound and its management is regarded as satisfactory. Accordingly, it is believed that the management of Applicant and Whitney Jefferson will be satisfactory and the prospects of the holding company, *which depend principally upon the prospects of Whitney New Orleans*, are favorable.

* * * * * * *

"* * * *The management and policies of the holding company system, it appears, would be equivalent to those of Whitney New Orleans:* * * *" (Emphasis supplied.)

The Board of Governors said, however, in denying the protestants' petition for reconsideration of its approval of Whitney Holding's application:

"* * * [T]hey [the arguments for reconsideration] relate largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency * * *."[12]

Whitney-New Orleans's purpose of evading federal and state statutes forbidding branch banking in Louisiana beyond parish lines was known to the Comptroller when

---

[12] This paragraph containing the excerpt last quoted above is as follows:

"The Board has considered the reasons advanced in the Petition for Reconsideration. To a considerable extent, these are based upon allegations that the Whitney Reorganization Program was not in conformity with applicable provisions of Federal statutes. It is also alleged that the Board's action 'will unnecessarily place into the hands of federally chartered banks a powerful and unfair competitive advantage over State banks * * *.' In the judgment of the Board, those arguments are without substantial merit. In addition, they relate largely to an alleged violation of provisions of the National Bank Act, which is administered by the Comptroller of the Currency, an official of the United States Treasury Department."

he approved the arrangement. His affidavit, which is in the record states:

> "• • • [T]he Whitney National wished to explore with the Comptroller whatever legal means were available for a like expansion into this growing area, which needs additional banking facilities. The formation of an affiliate bank was discussed and the formation of a holding company was also discussed. The Bank management felt that a holding company which would own 100% of the stock of both the old bank and the new bank would be preferable to the formation of an affiliate of which the controlling stock would be held by the same persons who control Whitney New Orleans, but which, in view of the wide stock distribution of Whitney New Orleans, would invariably have a minority of stockholders who did not own stock in both banks. The existence of the minority stock interest in each bank, which did not hold corresponding shares in the other, was considered by the Whitney management to be an undesirable situation because it could conceivably hamper the most efficient and effective day-to-day operation of the two banks. Since the same group would be managing both banks, it was thought that situations could arise in which it would be impossible for the interest of two different groups of minority stockholders to be fully protected. For this reason, the Whitney management, as was their right and prerogative elected to use a holding company for the purpose of establishing a new bank in Jefferson Parish.
>
> "At all times the applicable Louisiana statutes forbidding the establishment of branch offices across parish lines were fully considered and there was no suggestion that the formation of a holding company would be in any way clandestine or evasive. • • •"

The Comptroller states in his brief:

> "• • • [T]he Ninth Circuit has, in a case substantially on all fours with one at bar, recently rejected an attempt to hold the branch banking prohibition of 12 U.S.C. 36 applicable to an affiliate of a bank holding company. First Nat. Bank of Billings

v. First Bank Stock Corp., 306 F.2d 937 (C.A.9 [1962])

* * *"

The Billings case is far from being factually "on all fours" with the present case. There the bank holding company was organized in 1929, and had been operating in that capacity for 30 years. It possessed stock in 87 banks with 94 offices. Thus, it was not created or organized by a bank, as Whitney Holding was, solely for the purpose of opening a branch office of that bank. It was the traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks. It was not the type of holding company here involved, whose only capital was the money siphoned through it by Whitney-New Orleans to open Whitney-Jefferson in a prohibited location.

[8] And the Billings opinion says, at page 942:

> "* * * What must appellants show, to establish that Valley is such a branch? They must show, that, in substance, Midland is doing business through the instrumentality of Valley, or vice versa, in the same way as if the institutions were one. (Cf. Camden Trust Co. v. Gidney, D.C. Cir., 1962, [112 U.S.App. D.C. 197] 301 F.2d 521) We do not agree with appellees that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is not a branch of the other. In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it."

We agree with the Ninth Circuit that the corporate veil should be pierced whenever one bank is "doing business through the instrumentality of" the other or "in the same way as if the institutions were one." "The unitary type of operation," said in the Billings opinion to be "characteristic of branch banking," is present here. In such circumstances, the relation of parent and branch exists, even though the banks are separate corporate organizations.

The facts already recited sufficiently show, we think, that Whitney-New Orleans intends to do business through Whitney-Jefferson in the same way as if the institutions

were one. The president of Whitney-New Orleans frankly made this quite clear. We recite some of his statements: On June 28, 1961, in submitting to the Comptroller applications to organize Crescent City and Whitney-Jefferson and to consolidate Crescent City with the original Whitney-New Orleans, Whitney's president said:

> "These application form part of an overall plan for the operation in the Parish of Orleans and in the Parish of Jefferson of the Whitney organization in holding company form."

On October 27, 1961, he advised his shareholders that

> "The basic purpose of the program is to allow the Whitney organization in New Orleans to commence a Holding Company operation controlling a bank in East Jefferson Parish to protect Whitney's competitive position in that area into which many of Whitney's present customers have moved."

Addressing them on October 28, 1962, he spoke of Whitney-New Orleans and Whitney-Jefferson as "the combined banks," said the large and small banks will "have identical ownership as well as management," and referred to the organization plan as a "method of pooling all of the deposits of our customers and of our capital funds * * *." And, as we have pointed out, the Board of Governors of the Federal Reserve System said "the holding company itself is simply the means by which Whitney banking offices may be established and operated in East Bank [east Jefferson Parish]."

[9] Consequently, we pierce the corporate veil which shrouds this intricate transaction, and see Whitney-New Orleans attempting to establish a branch in Jefferson Parish in violation of 12 U.S.C. § 36(c). It is a boot-strap operation by which Whitney-New Orleans, using its own funds in corporate maneuvering, seeks to establish a branch in prohibited territory. Like Jacob of old, Whitney New Orleans covered its hands with the Esau-like plan of reorganization and, despite the telltale sound of its own voice, obtained the blessing of the Comptroller of the Currency. Unlike Isaac, however, the Comptroller was not gulled by the ruse; acting *ultra vires* in the circumstances shown,

he knowingly permitted it because he considered the end desirable, and because he thought the corporate maneuvering impervious to attack. But, when the corporate veil is pierced, it becomes apparent that both voice and hands were those of Whitney-New Orleans.

The Comptroller contends that the reasoning and holding of our Camden Trust opinion [13] are controlling here. We do not agree. Whitney of New Orleans considered the "affiliate" arrangement we approved in the Camden case, and decided not to use it because it does not permit the identity of ownership provided by the holding company device, and because it does not assure that even the permitted affiliation will remain constant.

Quite unlike the sum total of the several factors which led us to approve the "affiliate" status in the Camden Trust situation, we need observe only that here, *inter alia*, the holding company is not providing Whitney-Jefferson with new and fresh capital, but with capital supplied by Whitney-New Orleans; the new bank will be managed and controlled by the executives of Whitney-New Orleans; and the name, Whitney National Bank in Jefferson Parish (the last three words in small letters on its checks and other forms), is easily susceptible of confusion with the parent organizer,[14] The Whitney National Bank of New Orleans.

We are unwilling to extend the holding of the Camden Trust case to cover a situation such as that presented here. We think it clear that the opening of Whitney-Jefferson

---

[13] Supra, note 3.

[14] On June 28, 1961, the Whitney-New Orleans mailed to the then Comptroller of the Currency the following:

1. An application to organize the Crescent City National Bank.

2. An application to organize Whitney National Bank in Jefferson Parish.

3. An application for approval to consolidate the Crescent City National Bank with the present Whitney National Bank of New Orleans.

At that time, Whitney Holding Corporation had not been incorporated, so it was not the organizer of Whitney-Jefferson.

is prohibited by 12 U.S.C. § 36 and that, consequently, the Comptroller was properly enjoined from issuing a Certificate of Authority for it to begin business. It is therefore unnecessary for us to decide whether the opening is also prohibited by Act 275 of the Louisiana legislature.[15]

Affirmed.

[15] If so, the actual opening of Whitney-Jefferson would violate the state statute even if the Comptroller had already issued his Certificate of Authority, for Act 275 forbids the opening "whether or not, a charter, permit, license or certificate to open for business has already been issued."

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

Civil 1857—62

No. 17,672

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, *Appellant*,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL., *Appellees*.

Appeal from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed, and it is

FURTHER ORDERED by this Court that appellees recover from appellant their taxable costs on appeal, and have execution therefor.

Per Circuit Judge WILBUR K. MILLER.

Dated: Aug 14 1963

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

September Term, 1963

No. 17,672

WHITNEY NATIONAL BANK IN JEFFERSON PARISH, *Appellant*,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, *et al.*, *Appellees*.

No. 17,681

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, *Appellant*,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, *et al.*, *Appellees*.

Before: BAZELON, Chief Judge, WILBUR K. MILLER, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT, and McGOWAN, Circuit Judges, in Chambers.

ORDER

On consideration of the petition of appellant in case No. 17,672 for rehearing *en banc*, of the petition of appellant in case No. 17,681 for rehearing en banc, and of the answer thereto filed by appellee Banks, and on consideration of the motion of appellant in case No. 17,681 for leave to file a supplemental memorandum in support of the petition for rehearing *en banc*, and of the objection thereto filed by appellee Banks, and on consideration of the motion of appellee Banks for leave to file a supplemental appendix to their reply to appellant's petition for rehearing in case No. 17,681, it is

ORDERED by the court that: (1) Appellant's motion for leave to file a supplemental memorandum in support of the petition for rehearing *en banc* in case No. 17,681 is hereby denied; (2) The motion of appellee Banks for leave to file

supplemental appendix to their reply to appellant's petition for rehearing *en banc* in case No. 17,681 is hereby granted; and (3) Appellants' aforesaid petitions for rehearing *en banc* are hereby denied.

Per Curiam.

Dated: Oct 17 1963

Circuit Judges WRIGHT and MCGOWAN did not participate in the foregoing order.

(9827-7)